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Supreme Court, U.S.
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No. 95-783

In The

Supreme Court of the United States

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

BARBARA LYNN BELL,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant the petition for writ of certiorari where, less than two months ago, this Court denied a petition filed by the same petitioner in another case raising "identical" issues, and the petitioner has not identified any new facts or reasons which might warrant this Court's reconsideration.

2. Whether this Court should grant the petition for writ of certiorari where the State has not cited any valid basis for this Court's jurisdiction and has not demonstrated the existence of any federal issue under 28 U.S.C. §§ 1254, 1257.

3. Whether the petitioner has demonstrated a basis for this Court's review where the subject state court decision, holding that the trial court committed reversible error by intentionally mis-instructing a jury in violation of State statutes, is expressly premised upon adequate and independent state law grounds.

4. Whether this Court should review the State court decision on the basis of due process where the State court did not decide any due process issue.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Barbara Lynn Bell, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, the State of Oklahoma.

OPINIONS BELOW

On August 22, 1995, the Oklahoma Court of Criminal Appeals reversed the judgment and sentence of the respondent and remanded the case to the trial court for a new trial "pursuant to *Flores v. State*, 896 P.2d 558 (Okl. Cr. 1995)."[1] As noted, the court's decision was wholly based upon its prior opinion in *Flores v. State*, 896 P.2d 558, *reh'g denied*, 899 P.2d 1162 (Okla. Crim. App.). (Petition App., p. 2a). This Court denied the State's petition for writ of certiorari in *Flores* on November 27, 1995. *Oklahoma v. Flores*, ___ U.S. ___, 116 S.Ct. 548 (1995).

JURISDICTION

Petitioner cites 28 U.S.C. § 1254 as the applicable section describing the basis for this Court's jurisdiction. Section 1254 does not apply to cases in which review of a decision of the highest court of a State is sought. The petitioner has not stated any valid basis for this Court's

[1] The decision of the Oklahoma Court of Criminal Appeals is reprinted at pages 1a through 7a of the Appendix ("App.") to the Petition.

exercise of jurisdiction. *See* Rule 14.1(e) of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED[2]

28 U.S.C. § 1254.

28 U.S.C. § 1257.

Okla. Stat. tit. 12, § 577.2.

Okla. Stat. tit. 20, § 3001.1.

Okla. Stat. tit. 22, § 836.

Oklahoma Uniform Jury Instruction – Criminal, No. 109

Oklahoma Uniform Jury Instruction – Criminal, No. 903

STATEMENT OF THE CASE

On January 28, 1993, the respondent, Barbara Lynn Bell, was charged with first degree murder in the District Court of Tulsa County (Case No. CF-93-0479), Tulsa, Oklahoma. Following a jury trial, she was convicted of second degree murder and sentenced to twenty years imprisonment.

At the respondent's trial, the trial judge, the Honorable Clifford E. Hopper, intentionally administered jury instructions which substantively departed from uniform

[2] The full texts of the statutes involved are included in App. A to this Brief in Opposition.

instructions required to be given under Oklahoma law. The judge erroneously instructed the jury that the respondent was presumed to be "not guilty" and also instructed that the burden of proof in the case "is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information."

On January 24, 1995, the Oklahoma Court of Criminal Appeals rendered its opinion in *Flores, supra,* 896 P.2d 558. There, the court reversed the conviction of Jose Flores for the identical erroneous instructions which were administered at the respondent's trial. On June 27, 1995, the Oklahoma Court of Criminal Appeals denied the State's petition for rehearing in *Flores. See* 899 P.2d 1162.

The respondent raised two propositions of error on her direct appeal, each of which was premised on the trial judge's administration of the flawed instructions discussed by the court in, and dispositive of, *Flores.* By "Accelerated Docket Order", the Oklahoma Court of Criminal Appeals reversed the judgment and sentence rendered in the trial court and remanded for a new trial, basing its decision entirely on its prior opinion in *Flores.*

The State filed a petition for writ of certiorari in *Flores* on September 25, 1995. On November 20, 1995, while the *Flores* petition was pending, the State filed its petition for writ of certiorari in this case. This Court *denied* the petition in *Flores* on November 27, 1995. *Oklahoma v. Flores,* ___ U.S. ___, 116 S.Ct. 548 (1995). After the denial of the State's petition for writ of certiorari in *Flores,* and in view of the State's admission that "[t]he issues in this case are identical to those raised in *Flores,*"

(Petition, p. 3), the respondent asked that the State dismiss its petition, pursuant to Supreme Court Rules 46.1 and 46.2.(a). The State declined that request, claiming that the decision in *Bell* clarifies the majority and minority positions of the Oklahoma Court of Criminal Appeals.[3]

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[3] There is nothing in the petition which identifies for the Court (or the respondent) any substantive differences between the *Flores* and *Bell* opinions. In fact, there are none, and the State's decision to literally copy the *Flores* petition, with only minor cosmetic alterations, is indicative of that fact.

The "identical" elements of the *Flores* and *Bell* petitions are not limited to the issues raised. With the exception of changing "he" or "him" to "she" or "her", entire pages of the *Bell* petition are identical to the *Flores* petition. On other occasions, even the gender of the respondent is not corrected, and a number of typographical errors found in the *Flores* petition are repeated in the *Bell* petition. For example, in both petitions, the State quotes the majority opinion in *Flores* stating "out government is one of laws and not of men," as opposed to "our government is one of laws and not of men." (*Flores* petition, p. 9; *Bell* petition, p. 9). Similarly, each petition misquotes the *Flores* court's reference to *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934 (1978), stating that a presumption of innocence cautions jurors to "put away from their **mines** all the suspicion that arises from the arrest, the indictment, and the arraignment." (*Flores* petition, p. 10; *Bell* petition, p. 10). The jurors are instead cautioned to put these suspicions out of their **minds**. Even the first alleged reason for granting the writ (Petition, p. 4) states that the Oklahoma Court of Criminal Appeals erred in its conclusion that the respondent was denied "**his** Constitutional Right To A Fair Trial." This "reason" is taken directly from the *Flores* petition. (*Flores* petition, p. 4).

SUMMARY OF THE ARGUMENT

The petitioner has not identified a valid basis upon which this Court may exercise jurisdiction. There is none. The Oklahoma Court of Criminal Appeals did not decide a question of federal law, but instead expressly based its opinion on Oklahoma law. The error in this case involves a trial judge's advertent mis-instruction of a jury, in direct violation of state law; issues which are clearly within the authority of the Oklahoma Court of Criminal Appeals. The petitioner's claim that the lower court's decision is based upon the Due Process Clause is not supported by the record and cannot serve as the basis for this Court's review of the decision of the Oklahoma Court of Criminal Appeals, as that court's reversal was not based on any due process violation.

REASONS FOR DENYING THE WRIT

I. THIS COURT RECENTLY DENIED CERTIORARI IN *FLORES*, THE CASE UPON WHICH THE REVERSAL OF RESPONDENT'S CONVICTION IS BASED, AND THE PETITIONER HAS NOT IDENTIFIED ANY JUSTIFICATION FOR A DIFFERENT RESULT HERE. THERE IS NONE.

On November 27, 1995, this Court denied certiorari in *Oklahoma v. Flores*. In its petition for certiorari in the instant case, the State of Oklahoma acknowledges that "[t]he issues in this case are identical to those raised in *Flores v. State*." (Petition, p. 3). The petitioner further concedes that the *Flores* decision is "the sole basis for the

reversal of the [respondent's] conviction in the instant case." (*Id.*, p. 8).

The petition in this case does not set forth any rationale for this Court to treat the present case differently than *Flores*. In fact, the State has conceded that the issue in this case is controlled by *Flores*. In a letter attached to a pleading filed in this case on September 1, 1995 in the Oklahoma Court of Criminal Appeals, the State made the following statements:

> We intend to ask the Court of Criminal Appeals to stay issuance of the mandate while we seek United States Supreme Court review of the controlling issue in this [case] presented in *Flores v. State*.
>
> We are taking this step to insure the Court of Criminal Appeals will have the jurisdiction to apply a favorable ruling in the *Flores* case to Defendant Bell's case.

By proceeding in such a fashion, the petitioner is inviting the Court to treat this case as it did *Flores* – by denying certiorari. The petitioner has not differentiated the Oklahoma Court of Criminal Appeals' order in the present case from the *Flores* opinion, and has failed to articulate any valid basis for the Court to grant certiorari in this case.

The State's decision to proceed with this petition despite the Court's denial of certiorari in *Flores* is perhaps explained by proceedings collateral to the direct appeal.[4]

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[4] The respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of

Apparently, the State is interested in pursuing any means of attacking the Oklahoma Court of Criminal Appeals' decision which might allow it to avoid the referenced troublesome and extraordinary actions of certain of the State's employees. In this regard, it is noteworthy that the State knew of the various jurisdictional defects in the *Flores* petition, which had been called to the State's attention by the respondent in *Flores*, yet the State has elected to file a similarly defective pleading in the instant case, and it has made no effort to correct or explain these defects.

Oklahoma on February 22, 1995. *See Barbara Lynn Bell v. Neville Massie, et al.*, Case No. 95-C-169B. A remedy sought in the habeas proceeding is a bar to any re-prosecution of the respondent – a form of habeas relief recognized in the Tenth Circuit. *See Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1879 (1993). The events which warrant such relief include the concerted conduct of a number of employees of the State of Oklahoma, including the trial judge's court reporter, the Tulsa County District Court Administrator, and, possibly, the trial judge himself, in concealing or destroying the backup audiotapes utilized as an aid to the court reporter in the course of the respondent's trial.

Discovery is ongoing in the habeas matter as to the referenced events. Thus far, that discovery has been marked by (i) sworn testimony indicating the existence of a conspiracy to deprive the respondent of the means to fully and adequately prosecute an appeal and protect her interests and (ii) the exercise of the Fifth Amendment privilege against self-incrimination by the trial judge's court reporter.

II. THE STATE HAS NOT PROPERLY INVOKED THE COURT'S JURISDICTION. THE OPINION OF THE COURT OF CRIMINAL APPEALS IS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Rules of this Court require the petitioner to cite the statutory provision conferring jurisdiction on this Court. *See* Supreme Court Rule 14.1(e)(iv). The petitioner cites 28 U.S.C. § 1254 as the appropriate jurisdictional statute. However, § 1254 only invokes the Court's jurisdiction over writs of certiorari and certified questions arising from the federal courts of appeals. The present case arises out of the Oklahoma Court of Criminal Appeals, and § 1254 cannot serve as a basis for this Court to exercise jurisdiction.

Furthermore, the petitioner has failed to demonstrate that 28 U.S.C. § 1257, the statute governing jurisdiction over judgments rendered by the highest court of a State, confers jurisdiction on the Court. Section 1257 only confers jurisdiction on the Court to review final decisions of a state court where (i) the validity of a federal statute is drawn into question, (ii) the validity of a state statute is drawn into question on the ground that it is repugnant to federal law, or (iii) a right is claimed under federal law.[5]

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[5] In relation to the jurisdictional question, Rule 10 of the Rules of this Court sets forth examples of "compelling reasons" upon which the Court may grant a petition for writ of certiorari. These reasons include: conflicts of state courts on *federal* questions; situations in which a state court has decided an important question of *federal* law which has not been, but should be, decided by the Court; and situations in which a state court has decided a *federal* question in a way that conflicts with decisions

None of these bases for the exercise of this Court's jurisdiction exist.

In this case, the Oklahoma Court of Criminal Appeals based its decision on *state law*. At the respondent's trial, the judge gave the following instruction to the jury:

> You are instructed that the defendant is **presumed to be not guilty** of the crime charged against her in the Information unless her guilt is established by evidence beyond a reasonable doubt and that **presumption of being not guilty** continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt.

(Emphasis added). The court held that the trial judge erred in giving this instruction and reversed the respondent's conviction and remanded the case for a new trial pursuant to *Flores v. State*, 896 P.2d 558, *reh'g denied*, 899 P.2d 1162 (Okla. Crim. App.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 548 (1995).

In *Flores*, the court reversed the defendant's conviction and remanded the case for retrial because the "presumed not guilty" instruction deviated from an instruction required under Oklahoma statutory law. *Flores*, 896 P.2d 558, 560 (citing *Oklahoma Uniform Jury Instruction-Criminal-903* ("OUJI-CR-903") and 12 Okla. Stat. § 577.2). The fact that this holding is based on Oklahoma statutory law is demonstrated by the court's statement that, "[b]ecause OUJI-CR-903 correctly sets

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of the Supreme Court. The petitioner has completely failed to set forth any "federal" question which would compel this Court to review or grant its petition for certiorari.

forth the presumption of innocence and [Okla. Stat. tit. 12, § 577.2] requires trial courts to administer the uniform instructions, we find it was error to deviate from OUJI-CR-903." *Flores, supra,* 896 P.2d at 560.

Furthermore, the court stated that the test is "whether the error is harmless beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional **or statutory right**." *Id.* (emphasis added). A plethora of Oklahoma authority, including *Fontenot v. State,* 881 P.2d 69, 85, *reh'g denied,* (Okla. Crim. App. 1994); *Simpson v. State,* 876 P.2d 690, 693 (Okla. Crim. App. 1994); and Okla. Stat. tit. 20, § 3001.1, is cited in *Flores* as support for this proposition. *Id.* The court added, "[t]he presumption of innocence until proven guilty is a right guaranteed by statute," and referenced *Miller v. State,* 106 P. 538 (Okla. Crim. App. 1910) and § 836 of title 22 of the Oklahoma Statutes.[6] *Flores,* 896 P.2d at 560 n.3. The court concluded by stating "[w]e continue to adhere to the wisdom of our founding jurists and believe that [Okla. Stat. tit. 22, § 836] requires trial courts to instruct the jury on the presumption of innocence in every criminal case." *Id.* at 561; *see also Jenkins v. State,* 145 P. 500, 501 (Okla. 1914).[7]

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[6] Okla. Stat. tit. 22, § 836 provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

[7] The concurring opinion of Vice Presiding Judge Chapel, in the order denying rehearing in *Flores,* further demonstrates that the court relied on Oklahoma law. *See Flores v. State,* 899 P.2d 1162, 1164-65 (Okla. Crim. App. 1995) (Chapel, J.,

This Court has stated on several occasions that it will not review a state court decision which is based on adequate and independent state law grounds. *See, e.g., Sochor v. Florida*, 504 U.S. 527, 533, 112 S.Ct. 2114, 2119 (1992); *Illinois v. Rodriguez*, 497 U.S. 177, 182, 110 S.Ct. 2793, 2798 (1990); *Michigan v. Long*, 463 U.S. 1032, 1038-41, 103 S.Ct. 3469, 3475-78 (1983). This Court also lacks jurisdiction if the State court's opinion indicates that the State ground is an alternative holding. *Sochor*, 504 U.S. at 533, 112 S.Ct. at 2119; *Long*, 463 U.S. at 1041, 103 S.Ct. at 3478. In this case, the decision of the Oklahoma Court of Criminal Appeals is clearly based on State law and, therefore, 28 U.S.C. § 1257 does not confer jurisdiction on this Court.

III. IT IS WITHIN THE STATE COURT'S AUTHORITY TO REMEDY A DIRECT AND INTENTIONAL DISREGARD OF STATE LAW BY A DISTRICT COURT JUDGE.

The Oklahoma Court of Criminal Appeals intended to remedy the trial judge's *intentional* disobedience of state law. The trial judge has advertently administered the erroneous instruction in a number of cases, and it is within the authority of the Oklahoma Court of Criminal Appeals to remedy that misconduct. As Judge Chapel noted in his concurring opinion in *Flores*, "[t]he trial judge himself appreciates the radical difference between

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concurring) ("[a] majority of this Court finds the error in this case to be a substantial violation of a statutory right.").

the phrases 'presumed innocent' and 'presumed not guilty.' " *Flores*, 899 P.2d at 1166.[8]

The Oklahoma Court of Criminal Appeals has the authority and the duty to enforce Oklahoma law. Its decision has remedied a clear and intentional violation of state law by one trial judge in one county of the State. No federal interest exists in reviewing the Oklahoma Court of Criminal Appeals' decision. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955) (certiorari on cases which are either "academic or episodic" should be declined).

IV. JURISDICTION MAY NOT BE BASED UPON DUE PROCESS GROUNDS BECAUSE THE COURT OF CRIMINAL APPEALS DID NOT DECIDE ANY DUE PROCESS ISSUE.

In its third proposition, the petitioner argues that the Oklahoma Court of Criminal Appeals erred in finding that the trial judge's instruction, which stated that the prosecution has the burden of proving all the material allegations of the information beyond a reasonable doubt,

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[8] In making this statement, Judge Chapel referenced a comment which was made by the trial judge in another case (*Smith v. State*, Tulsa County District Court, CF-93-4510):

> Again as I have stated many, many times I do not give an instruction that is in the OUJI; to give a reason for not doing so, I believe that in the OUJI instruction, they state that the defendant is presumed to be innocent. There is a difference between being innocent and not guilty. A person can be found not guilty and still not be innocent of the crime charged.

Flores, 899 P.2d at 1166 (footnote omitted).

violated the Due Process Clause. This alleged proposition of error is not a proper basis for review of the decision of the Oklahoma Court of Criminal Appeals because the court did not decide the respondent's case on any due process ground.

Due process was not mentioned in the Accelerated Docket Order which reversed the judgment and sentence of the trial court. Furthermore, although the court in *Flores* reviewed the instruction requiring the prosecution to prove the material allegations of the information (as opposed to the elements of the crime), the court limited its holding to require that the uniform instructions be administered as mandated by state statute. *Flores*, 896 P.2d at 562-63. The petitioner argues that the Oklahoma Court of Criminal Appeals held "that *Sullivan v. Louisiana* [, ___ U.S. ___, 113 S.Ct. 2078 (1993)], mandated use of the phrase 'elements of the offense.' " (Petition, p. 12). However, the court made no such finding. The court simply stated that the instruction "may be confusing" and prescribed that it not be given in the future. *Flores*, 896 P.2d at 563.

Because the Court of Criminal Appeals did not decide this case, or *Flores*, on due process grounds, the petitioner's attempt to raise due process as a basis for this Court's review is meritless. This Court has repeatedly stated that it has no jurisdiction to review a state court decision unless a federal question has been "both raised and decided in the state court below." *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 2321 (1983) (citing *Crowell v. Randell*, 35 U.S. 368 (1836)). Since no federal

question was raised or decided below, a review of the petition for certiorari is improper.

CONCLUSION

The lower Court's decision is expressly based upon adequate and independent state law grounds. There is no valid statutory basis upon which this Court may exercise jurisdiction. The statutory basis cited by the State applies to federal courts of appeals, and the factual and legal circumstances of this case do not meet the standards applicable to a petition arising from a decision of a state court of last resort.

Two (2) months ago this Court considered, and rejected, issues which the State of Oklahoma has conceded in its petition are identical to those which are here being raised again. No factual or legal distinction between the petition for writ of certiorari in *Flores*, which was denied, and the petition here has been identified. The State's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A – STATUTES INVOLVED

28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1257 provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Okla. Stat. tit. 12, § 577.2 provides:

> Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law.

Okla. Stat. tit. 20, § 3001.1 provides:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

Okla. Stat. tit. 22, § 836 provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

Oklahoma Uniform Jury Instruction – Criminal, No. 109 provides:

> The defendant(s) [has] [have] pled not guilty. A plea of not guilty puts in issue each element of the crime with which the defendant(s) [is] [are] charged. A plea of not guilty requires the State to prove each element of the crime beyond a reasonable doubt.

Oklahoma Uniform Jury Instruction – Criminal, No. 903 provides:

> The defendant(s) [is] [are] presumed innocent of the crime(s), and the presumption continues unless after consideration of all the evidence you are convinced of [his] [her] guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant(s) must be found guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime(s).